

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323
No. 12-md-2323-AB

THIS DOCUMENT RELATES TO:

CIVIL ACTION
Case No. 2:12-cv-1023

VERNON MAXWELL, et al.

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

**RIDDELL DEFENDANTS' NOTICE OF MOTION AND MOTION TO SEVER
PURSUANT TO FRCP 20 AND 21; MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF PAUL G. CEREGHINI; EXHIBITS "A" – "B"**

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EB SPORTS CORP.; and RBG HOLDINGS CORP.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

VERNON MAXWELL, et al.,

Plaintiffs,

vs.

NATIONAL FOOTBALL LEAGUE,
et al.,

Defendants.

CASE NO.: CV 11-8394 R (MANx)

**RIDDELL DEFENDANTS' NOTICE
OF MOTION AND MOTION TO
SEVER PURSUANT TO FRCP 20
AND 21; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF PAUL G.
CEREGHINI; EXHIBITS "A" - "B"**

Date: January 17, 2011

Time: 10:00 a.m.

Dept: Courtroom 8

Judge: Hon. Manuel L. Real

Notice of related cases:

No. CV 11-08395 R (MANx)

No. CV 11-08396 R (MANx)

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA AND ALL PARTIES AND
THEIR COUNSEL OF RECORD HEREIN:**

PLEASE TAKE NOTICE THAT on January 17, 2012, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 8 of the United States District Court, Central District of California, Western Division, located at 312 N. Spring Street, Los Angeles, California 90012, Defendants Riddell, Inc. (erroneously styled as “d/b/a Riddell Sports Group, Inc.”); All American Sports Corporation; Riddell Sports Group, Inc.; Easton-Bell Sports, Inc.; Easton-Bell Sports, LLC; EB Sports Corp.; and RBG Holdings Corp. (collectively, the “Riddell Defendants”)¹ will move the Court for an order pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure (“FRCP”) to sever from each other the claims of the named Plaintiffs who have been misjoined in this action and to require each of the named Plaintiffs to file separate complaints in separate actions against the Riddell Defendants, or for such other relief as the Court deems appropriate to address the misjoinder of these claims. The Riddell Defendants base this motion on the grounds that: (1) the named Plaintiffs’ rights to relief do not each arise out of the same transaction, occurrence, or series of transactions or occurrences; (2) their claims lack common questions of law and fact; and (3) even if the claims were properly joined - which they are not - this Court should nonetheless sever them to prevent prejudice, delay, jury confusion, and judicial inefficiency.

The Riddell Defendants recognize that Plaintiffs all recently amended their Complaints (for a second time, in *Barnes*). The Riddell Defendants previously moved for severance based on the prior Complaints. The Amended Complaints do

¹ Referring to these Defendants collectively does not imply or concede that they are properly joined or named as Defendants, and the “Riddell Defendants” reserve the right to move to dismiss some or all of them. The collective reference is merely for convenience.

1 not address any of the issues in those motions to sever. Moreover, Plaintiffs
2 appear to concede that point and the fact that considering those original motions to
3 sever is appropriate despite their amendments, presumably because the Amended
4 Complaints do not attempt or purport to address the issues raised in the motions to
5 sever. Thus, the Riddell Defendants have contemporaneously replied in support of
6 those motions to sever, which are currently set for hearing on January 3, 2012.

7 The Riddell Defendants file these current motions anew in the event the
8 Court deems that these misjoinder arguments should not be based on the prior
9 Complaints, but instead, prefers that the Riddell Defendants to move as to the
10 operative versions of the Complaints. These current motions may also facilitate a
11 hearing on the same date when the Court will hear the NFL and Riddell
12 Defendants' motions to dismiss.

13 The Riddell Defendants base this Motion on the Memorandum of Points and
14 Authorities set forth below and pleadings, records, and files in this action, and such
15 other and further evidence and argument as may be presented at the time of the
16 hearing.

17 This Motion is made following the conference of counsel pursuant to L.R. 7-
18 3 which took place on November 7, 2011.

19 DATED: December 20, 2011

BOWMAN AND BROOKE LLP

20
21 By: /s/ Paul G. Cereghini

Paul G. Cereghini

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26 BELL SPORTS, INC.; EASTON-

27 BELL SPORTS, LLC; EB SPORTS

28 CORP.; and RBG HOLDINGS

CORP.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The joinder across these three actions of 136 individual former NFL players (and 84 spouses),² who played football at various times over the course of more than 50 years for many different teams in dozens of different cities, allegedly sustaining distinct injuries in different ways, at different times, with different results, and while wearing different helmets, into three Amended Complaints is improper and violates FRCP 20 and 21. This Court should sever these disparate and misjoined claims because: (1) Plaintiffs' alleged rights to relief do not arise out of the same transaction, occurrence, or series of transactions or occurrences; (2) their claims lack common questions of law or fact; and (3) even if the claims were properly joined – which they are not – severance is appropriate to prevent prejudice, delay, confusion, and judicial inefficiency.

In these three actions, 220 total Plaintiffs³ sue multiple entities, alleging the former player-Plaintiffs sustained various “traumatic brain injuries”⁴ during their careers in the NFL, which spanned an overall period of 56 years, from 1953 to 2009. (*Barnes* Second Am. Compl. (“*Barnes* SAC”) ¶ 153; *Maxwell* First Am.

² *Maxwell* Plaintiffs Brett and Emily Romberg, Ottis and Wanda Anderson, and Tina Jones (spouse of Gary Jones) dismissed their claims.

³ The *Maxwell* action currently includes 73 former NFL players and 48 spouses. The *Pear* action includes 47 former players and 32 spouses. And the *Barnes* matter includes 16 former NFL players (one deceased) and 4 spouses.

⁴ Plaintiffs lump all traumatic brain injuries (“TBI”) together, but many different injuries fall within the umbrella of TBI, including concussion, skull fracture, hypoxia, anoxia, contusion, contrecoup, diffuse axonal injury, subdural hematoma, epidural hemtoma, and intracerebral hematoma. Nat’l Inst. of Neurological Disorders & Stroke, Nat’l Inst. of Health, *Traumatic Brain Injury: Hope through Research, What Are the Different Types of TBI?*, available at http://www.ninds.nih.gov/disorders/tbi/detail_tbi.htm# 169973218 (last visited Dec. 20, 2011).

1 Compl. (“*Maxwell* FAC”) ¶ 453.)⁵ In addition to the NFL, the three Amended
2 Complaints name seven Defendants to whom Plaintiffs collectively refer to as the
3 “Riddell Defendants,” which includes Defendants Riddell, Inc. (erroneously styled
4 as “d/b/a Riddell Sports Group, Inc.”), All American Sports Corporation, Riddell
5 Sports Group, Inc., Easton-Bell Sports, Inc., Easton-Bell Sports, LLC, EB Sports
6 Corp., and RBG Holdings Corp. (*See, e.g., Maxwell* FAC ¶¶ 76-83.)

7 According to Plaintiffs, two of these entities – Riddell, Inc. and All
8 American Sports Corporation – were “engaged in the business of designing,
9 manufacturing, selling and distributing football equipment, including helmets, to
10 the NFL and since 1989 has been the official helmet of the NFL.” (*Id.* ¶¶ 76-77.)
11 As to the other five Riddell Defendants, the Complaints contain no allegations
12 whatsoever of any involvement in the design, manufacture, sales, or distribution of
13 football helmets, or any affiliation with Riddell, Inc. or All American Sports
14 Corporation. (*See id.* ¶¶ 78-82.)

15 Using identical, boilerplate language, all of the former NFL player-Plaintiffs
16 allege they “suffered multiple concussions that were improperly diagnosed and
17 improperly treated throughout [their] career[s]” as professional football players.
18 (*See, e.g., id.* ¶ 178.) None of the player-Plaintiffs allege what brand of helmet
19 they were wearing when they experienced a concussion. Moreover, despite having
20 amended their Complaints, the *Maxwell* and *Pear* Plaintiffs still fail to allege they
21 were even wearing “Riddell” helmets when they suffered their alleged
22 concussions. All Plaintiffs, likewise, fail to state any facts regarding when their
23 alleged concussions occurred, how they occurred, where they occurred, or how any
24

25
26 ⁵ *Maxwell* Plaintiffs Brett Romberg and his wife moved for dismissal without
27 prejudice after Mr. Romberg re-signed with the Atlanta Falcons for the 2011-12
28 NFL season, making *Maxwell* Plaintiff Todd Johnson the player with the most
recent playing dates. (*Maxwell* FAC ¶¶ 452-56.)

1 conduct on the part of any of the Riddell Defendants proximately caused their
2 alleged injuries.

3 Moreover, and more importantly for purposes of this motion, Plaintiffs'
4 claims are not only legally deficient,⁶ they are also entirely distinct and disparate.
5 Plaintiffs' claims differ from each other in many fundamental respects, including,
6 for example, in the make and model of the helmets they wore, the existence of
7 modifications to those helmets, the condition of their helmets at the time of their
8 alleged injuries, the availability of alternative designs and technology in the time
9 period applicable to each player, the warnings and information available to the
10 player-Plaintiffs, player experience before and during play in the NFL, and the
11 mechanics, nature, extent and cause of each alleged injury.

12 In addition, Plaintiffs are residents of twenty-eight (28) different states and
13 played for thirty (30)⁷ different NFL teams in different cities and states. In total,
14 across these three actions, at least thirty-three (33) different jurisdictions' laws
15 might arguably apply to Plaintiffs' claims. However, Plaintiffs do not identify by
16 which jurisdictions' laws their claims should be resolved.

17 **II. ARGUMENT**

18 FRCP 20(a) permits the joinder of multiple plaintiffs in one action if:

- 19 (A) they assert any right to relief jointly, severally, or in the alternative in
20 respect of or arising out of the same transaction, occurrence, or series
21 of transactions or occurrences; and
22 (B) if any question of law or fact common to all these persons will arise in
23 the action.

24 ⁶ The insufficiency of Plaintiffs' allegations to sustain their claims against the
25 Riddell Defendants is addressed separately in the Riddell Defendants'
26 contemporaneously filed Motion to Dismiss.

27 ⁷ Several of these franchises moved cities during the course of the 50-plus-year
28 period covered by the Complaints. Thus, for instance, counting the St. Louis
Cardinals as a different team from the Arizona Cardinals brings the total number of
different teams to 36.

1 FRCP 20(a); *see also Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). If
2 the two-part test for permissive joinder is not satisfied, a court, in its discretion,
3 may properly sever the misjoined parties, so long as no substantial right will be
4 prejudiced by the severance. *See* Fed. R. Civ. P. 21 (“on motion or on its own, the
5 court may . . . sever any claim against any party”); *see also Coughlin*, 130 F.3d at
6 1350. A court has broad discretion when ruling on a motion to sever claims under
7 FRCP 21. *Heritage Pac. Fin., LLC v. Cole*, No. CV 10-0394 PSG, 2010 WL
8 1838106, at *3 (C.D. Cal. May 3, 2010) (citing *Sams v. Beech Aircraft Corp.*, 625
9 F.2d 273, 277 (9th Cir. 1980); 4 *Moore’s Federal Practice*, § 21.02[4] (Matthew
10 Bender 3d ed. 2009)).

11 Multiple plaintiffs cannot pass FRCP 20(a)(1)’s two-part test for proper
12 permissive joinder where, as here, each plaintiff’s claim arises from a different
13 factual background. *Coughlin*, 130 F.3d at 1350. In such a case, the court can
14 generally dismiss all but the first named plaintiff without prejudice to the dropped
15 plaintiffs filing new, separate lawsuits against some or all of the defendants based
16 on the claim or claims attempted to be set forth in the improperly commingled
17 complaint. *Id.* at 1350-51.

18 Even where the FRCP 20(a)(1) requirements are met, the court may, in its
19 discretion and pursuant to FRCP 20(b), “sever for at least two reasons: (1) to
20 prevent jury confusion and judicial inefficiency, and (2) to prevent unfair prejudice
21 to the [defendants].” *Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1088 (C.D.
22 Cal. 2002) (citing *Coleman v. Quaker Oats Co.*, 232 F.2d 1271, 1296 (9th Cir.
23 2000)); *see also Coleman*, 232 F.2d at 1296 (“Even once these requirements [of
24 FRCP 20(a)(1)] are met, a district court must examine whether permissive joinder
25 would comport with the principles of fundamental fairness or would result in
26 prejudice to either side. Under FRCP 20(b), the district court may sever the trial in
27 order to avoid prejudice.” (citing *Desert Empire Bank v. Ins. Co. of N. Am.*, 623
28 F.2d 1371, 1375 (9th Cir. 1980)) (internal citations omitted)).

1 Plaintiffs fail to meet the standard for proper joinder of their disparate
2 claims. There is nothing common in law or fact among them supporting proper
3 joinder. Therefore, pursuant to FRCP 21, this Court should, as it has done in the
4 past, sever the individual Plaintiffs' claims, pursuant to FRCP 21, with the
5 remaining claims pursued, if at all, as separate, individual actions with new case
6 numbers. *See Adams v. I-Flow Corp.*, C.D. Cal., Western Div., No. 2:09-cv-
7 09550-R-SS, Dkt No. 81 (Order dated 03/30/2010) (unpublished) (attached as Ex.
8 "A") (hereinafter "*Adams*").

9 Moreover, even if Plaintiffs were able to show proper joinder under FRCP
10 20(a)(1) - which they cannot - this Court should nonetheless sever these claims to
11 prevent delay, jury confusion, judicial inefficiency, and prejudice to the Riddell
12 Defendants. *See Fed. R. Civ. P. 20(b)*.

13 **A. Plaintiffs' claims arise from separate occurrences that should not**
14 **be joined in a single action.**

15 Permissive joinder under FRCP 20 first requires a similarity of transactions
16 or occurrences. *Fed. R. Civ. P. 20(a)(1)(A)*. Merely alleging that various plaintiffs
17 experienced generally similar problems with various defendants' products is not
18 enough to support proper joinder. *See Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th
19 Cir. 1983) (resolving that, in an action alleging breach of warranty claims
20 concerning automobiles, the fact that the plaintiffs alleged similar problems did not
21 mean that the claims were transactionally related).⁸

22 ⁸ In opposing the original motions to sever, Plaintiffs attempted to distance
23 themselves from relevant joinder precedent by arguing that the *Saval* case is "not
24 binding authority" and "distinguishable." (*Maxwell Pls.' Opp. to Riddell Defs.'
25 Mot. to Sever* at 7; *Barnes Pls.' Opp. to Riddell Defs.' Mot. to Sever* at 3.) *Saval*
26 is not distinguishable in any meaningful way. Moreover, both the Ninth Circuit
27 and this Court have recognized the precedential value of *Saval* and have both cited
28 and followed it. *See, e.g., Coughlin*, 130 F.3d at 1351 (citing *Saval*); *Huezo v.
Westfield Topanga Owner L.P.*, No. CV 11-00800 MMM (PJWx) (C.D. Cal. May
9, 2011) (Morrow, J.) (citing *Saval* as supporting conclusion that plaintiffs' claims

1 In *Saval*, four plaintiffs argued that their claims against several automobile-
2 seller defendants were properly joined under Rule 20 because “they purchased
3 their automobiles and experienced similar problems, none of which could be fixed
4 satisfactorily.” *Id.* The district court rejected the attempted joinder, finding that
5 the plaintiffs’ argument “conveniently glosse[d] over the differences between the
6 unique histories of each of the four automobiles,” and that they had “not
7 demonstrated that any of the alleged similar problems resulted from a common
8 defect.” *Id.* After noting that FRCP 20 does not require “[a]bsolute identity of all
9 events,” and that “the rule should be construed in light of its purpose, which ‘is to
10 promote trial convenience and expedite the final determination of disputes, thereby
11 preventing multiple lawsuits,’” the Fourth Circuit affirmed. *Id.* at 1031 (quoting
12 *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1332-33 (8th Cir. 1974)).

13 Turning to the specific facts before it, the *Saval* court noted that the “cars
14 were purchased at different times, were driven differently, and had different
15 service histories. Quite probably, severance would have been required in order to
16 keep straight the facts pertaining to the separate automobiles.” *Id.* The court
17 concluded that “the purposes behind FRCP 20 would not be furthered” by allowing
18 the attempted joinder, and that “considering the claims asserted by [the plaintiffs]
19 in a single action would not enhance judicial economy.” *Id.* at 1032.

20 Thus, the *Saval* court upheld severance of only four plaintiffs’ claims due to
21 concerns over the lack of commonality, factual differences between their claims,
22 and failure of joinder to promote the purposes of FRCP 20. Here, those same
23 concerns predominate, given that the player-Plaintiffs necessarily wore different
24 helmets designed and produced over the course of more than fifty (50) years, with
25 different usage histories, reconditionings, modifications, labels, manuals and so
26 forth. However, the concerns mentioned in *Saval* over differences between four
27 of violations of Americans with Disabilities Act involved separate and distinct
28 injuries and, therefore, were distinct transactions).

1 plaintiff's products and their claims are multiplied exponentially here, given the
2 attempted joinder of 136 separate player-Plaintiffs (including deceased *Barnes*
3 player *Lens*) and 84 spouse-Plaintiffs.

4 This Court recently considered a strikingly similar improper attempt to join
5 dozens of plaintiffs' unrelated claims into one mass-tort filing. Specifically, in
6 *Adams*, the plaintiffs, who were represented by the same counsel as the *Maxwell*
7 and *Pear* plaintiffs here (Girardi|Keese), attempted to join 141 plaintiffs who had
8 undergone "separate shoulder surgeries that were performed at different times over
9 the span of a ten (10) year period." *Adams* at 13. The Court found that the
10 "surgeries were performed in different hospitals located in thirty-seven (37) states
11 and Canada" by "numerous different surgeons, anesthesiologists, and other
12 physicians . . . who [were] unlikely to have any common link to any two (2) of
13 these plaintiffs, let alone one-hundred, forty-one (141) of them." *Id.*

14 Based on these facts, the Court determined that the *Adams* plaintiffs' claims
15 did "not arise out of the same transaction, occurrence, or series of transactions or
16 occurrences," and, therefore, the attempted joinder was improper and in violation
17 of FRCP 20, requiring severance. *Id.* at 13-14.⁹ During oral argument on the
18 motion to sever, the Court explained that the joined claims were actually "140
19 litigations, all different. All different because they are different people who have
20 been affected differently by different people and by different drugs." Tr. of Oral
21 Arg. at 5, *Adams v. I-Flow, Corp.*, C.D. Cal., Western Div., No. 2:09-cv-09550-R-
22 SS (attached as Ex. "B").

23 Citing case law from other jurisdictions, the Court explained that "other
24 district courts have severed the claims of multiple plaintiffs, finding that the sole
25 common allegation of pain pump or anesthetic use did not constitute a same
26 transaction, occurrence, or series of transactions or occurrences." *Id.* (citing

27 ⁹ A copy of the transcript of the hearing on the *I-Flow* defendants' motion to sever
28 is attached as Ex. "B."

1 *Warner v. Stryker Corp.*, No. 08–6368–AA, 2009 WL 1773170 (D. Or. June 22,
2 2009); *Frobes v. Stryker Corp.*, No. 08 CV 1897(NG)(MDG), 2009 WL 3387037
3 (E.D.N.Y. Aug. 5, 2009)). Finding misjoinder, the Court severed the *Adams*
4 plaintiffs’ claims, retained jurisdiction under 28 U.S.C. §1332(d), and ordered that
5 “the claims for which the Court has dismissed with leave to amend may only be
6 maintained going forward, if at all, in individual actions.” *Id.* (citing *Cooper v.*
7 *R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312 (M.D. Fla. 2008)); *see also*
8 *Anrig v. Ringsby United*, 603 F.2d 1319, 1325 (9th Cir. 1979) (discussing the
9 flexibility the district court has in dealing with misjoined claims).

10 For the same reasons as in *Saval* and *Adams*, this Court should sever
11 Plaintiffs’ improperly-joined claims. As in *Saval*, the products used over the
12 course of more than fifty (50) years by 136 different players are too distinct to
13 support proper joinder. Also, like in *Adams*, Plaintiffs have attempted to join
14 dozens and dozens of individuals’ claims, arising from different facts occurring in
15 dozens of different states while wearing different football equipment. Also, while
16 Plaintiffs generally claim their injuries all occurred while playing professional
17 football, as in *Adams*, Plaintiffs are, in fact, all “different people who have been
18 affected differently by different people and by different [products].” Ex. B at 5.

19 If anything, the misjoinder here is even more egregious than in *Adams*,
20 where the alleged conduct and injuries occurred over a period of ten (10) years.
21 Ex. A at 13. Here, the alleged injuries took place over not ten, but over fifty (50)
22 years – from 1953 to 2009. Thus, if anything, there is even less of an argument
23 here that the claims arise out of the same transaction or occurrence, or even the
24 same series of transactions, and there is even more compelling reason to sever
25 these improperly-joined claims than there was in *Adams*.

26 In short, Plaintiffs fail to satisfy the first prong for permissive joinder under
27 FRCP 20(a). Therefore, following *Adams*, and pursuant to FRCP 21, this Court
28 can and should sever these distinct claims.

B. Plaintiffs' claims do not involve common questions of law or fact.

Plaintiffs also fail the second prong of FRCP 20(a) for permissive joinder because their claims do not involve common questions of law or fact. To the contrary, their claims are each separate, distinct, and unique.

It is common knowledge that football helmet technology has changed drastically over the course of the more than fifty-year period covered by the Amended Complaints, as the pictures below document.¹⁰



While Plaintiffs' Amended Complaints now allege generally that the players wore Riddell helmets (at least, at times, for the *Maxwell* and *Pear* Plaintiffs), they

¹⁰ This graphic timeline is taken from <http://www.riddell.com/innovation/history/>. The Court can and should take judicial notice of the undisputed fact that football helmets have changed considerably between 1953 and 2009. *See* Fed. R. Evid. 201 (providing that a court can take judicial notice of a fact not subject to reasonable dispute that is either: (1) generally known in the community where the court is located; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned); *see also, e.g., Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102 (N.D. Cal. 2003) (finding that it was appropriate for the court to take judicial notice that refrigerated goods are generally perishable because that fact is a matter of common knowledge).

1 are still devoid of any allegations of what model helmet(s) any of the players wore.
2 For any player-Plaintiff who claims to have been wearing a Riddell helmet at the
3 time of an alleged injury (and the *Maxwell* and *Pear* Plaintiffs still do not allege
4 this), individualized fact issues will include determining the specific helmet model
5 worn. Over the half-century time span covered by Plaintiffs' Complaints, Riddell
6 manufactured dozens of different helmet models with different features and
7 designs within model lines, as the *Maxwell* and *Pear* Plaintiffs acknowledge in
8 cataloging the various different designs and safety innovations in Riddell helmets
9 over the years. Riddell, <http://www.riddell.com/innovation/history/> (last visited
10 Dec. 20, 2011); *see also, e.g., Maxwell* FAC ¶¶ 95-99.¹¹ These differences
11 included varied shell designs including early two-piece shells, and shells with
12 different sizes, shapes, weights, centers of gravity, materials and other differences.
13 Over these decades, helmets incorporated significantly different energy-absorbing
14 liner designs, including suspension webbing, multi-crown suspension webbing,
15 rubber padding, air cells, liquid cells, expanded polystyrene pads and others. Some
16 helmet lines offered optional supplemental padding. Riddell,
17 <http://www.riddell.com/innovation/history/> (last visited Dec. 20, 2011).

18 In spanning more than five decades beginning in the mid 1950's, Plaintiffs'
19 design claims against the Riddell Defendants cover helmets designed prior to the
20 existence of industry standards and under different versions of standards
21 promulgated after formation of the National Operating Committee on Standards for
22 Athletic Equipment ("NOCSAE") in 1969.¹² Material and manufacturing
23 techniques used in today's helmets did not exist in the 1950's, 1960's, 1970's and

24 ¹¹ In fact, the *Maxwell* and *Pear* Plaintiffs largely cut and paste from Riddell's
25 website for their allegations concerning "Riddell" in their amended complaints.

26 ¹² NOCSAE is a non-profit charitable corporation created in 1969 to create
27 standards for football helmets. NOCSAE, http://nocsae.org/helmet-standards.html?gclid=CNCWn5_mvawCFYqA5QodUUcyqA (last visited Dec. 20,
28 2011).

1 1980's. The technical and scientific knowledge used in developing today's
2 helmets did not exist in the 1990's. Over this wide time period, there were also
3 vast differences in Riddell's competitors and competitive helmet products available
4 to the different generations of player-Plaintiffs.¹³

5 As addressed in the Riddell Defendants' motion to dismiss, the claims of the
6 vast majority, if not all of Plaintiffs' claims are facially barred by the applicable
7 statutes of limitation. Any remaining Plaintiffs, who claim to have experienced
8 football-related injuries in the several years before Plaintiffs filed their Complaints,
9 face individualized issues concerning the applicable statutes of limitations that may
10 well bar all of their claims as well.

11 Plaintiffs' claims against the Riddell Defendants will require further player-
12 by-player, helmet-by-helmet individualized determinations about whether each
13 individual player-Plaintiff appropriately used or misused any helmet he claims to
14 be deficient. For starters, NOCSAE guidelines for football helmet inspections
15 highlight many of the individualized issues implicated by Plaintiffs' claims against
16 the Riddell Defendants. NOCSAE recommends that players conduct the following
17 inspection prior to each helmet use:

27 ¹³ Many of the competitor helmet manufacturers in the 1960's, 1970's and 1980's
28 are now either out of business or no longer manufacturing football helmets.

HELMET INSPECTION

Football/Lacrosse/Ice Hockey

A number of guidelines are in place to assist persons responsible for the inspection of and repair/maintenance of helmets. The following list is not intended to cover every observation. It is recommended that a periodic inspection be made of all helmets, and that they be periodically rechecked and repaired by a licensed/recommended.

Suggested Inspection Check List

EXTERIOR:

1. Check helmet to be agreeable with manufacturers' instructions and procedures.
2. Examine shell for cracks, particularly noting any cracks around holes, where light shines with. Recheck any shells that have cracked.
DO NOT USE A HELMET WITH A CRACKED SHELL.
3. Examine all mounting points, screws, valves and straps for breakage, distortion, or other problems. Repair as necessary.
4. Replace face mask if bare metal is showing, if there is a broken weld, or if the mask is grossly misshapen. Tighten or replace loose or damaged faceguard attachments.
5. Examine for helmet completeness, and replace any parts which have become damaged, such as jawstoppers, interior parts, nose bumpers and chinstraps.
6. Examine chinstrap for proper adjustment, and inspect to see if it is broken or stretched out of shape, and inspect the snaps, or attaching hardware to see if replacement is needed.
7. Read and follow instructions provided by manufacturer regarding care and maintenance procedures.
8. Never allow anyone to sit on helmets. This practice could crush or deform the helmet.

CAUTION:

Only paints, dyes, decals or cleaning agents approved by the manufacturer are to be used on any helmet. It is possible to get an "even" or "different" look by using unauthorized materials, which could potentially damage the helmet shell and affect its performance and durability.

PLAYERS:

Inspect your particular helmet prior to each usage as follows:

INTERIOR: Padded Style

Foam/Air/Liquid

1. Check foam padding for proper placement and any deterioration.
2. Check for cracks in the vinyl tubing covering of air foam and liquid padded helmets.
3. Check that the protective system or foam padding has not been altered or removed.
4. Check for proper amount of inflation in air padded helmets. For those helmets with an external pump, check for proper operation of pump, and check valve. Follow manufacturer's recommended practice for adjusting air pressure/ft. of the system.
5. Replace jaw parts when damaged. Check for proper installation and fit.
6. Examine all rivets, screws, MC and valves to make sure they are properly fastened and holding protective parts.

If any of the above inspections indicate a need for repair and/or replacement, notify your coach or equipment manager immediately. This is your responsibility.

NEVER WEAR A DAMAGED HELMET!

16

17

Plaintiffs' improperly joined actions also overlook individualized issues concerning reconditioned helmets. Often, football helmets are used for multiple seasons with periodic reconditioning. Individualized determinations will include whether any allegedly deficient helmet had been reconditioned, whether such reconditioning was done by a third-party, and whether it was done properly and within the overall useful lifespan of the helmet. *See, e.g., Brian James Mills, Football Helmets and Products Liability*, 8 J. Sports Law 153, 156 (2001)

1 (discussing helmet reconditioning and recertification programs and how “the
2 expected life of a helmet depends on numerous factors such as temperature,
3 humidity, altitude, pollution, sunlight, storage, maintenance, the player’s position,
4 the player’s field and practice time, and the length of the season”).

5 The inappropriateness of joining even two player-Plaintiffs’ claims, let alone
6 claims by 136 players, is further underscored by the high probability that each
7 individual Plaintiff wore multiple helmets while playing in the NFL, and many
8 other helmets during years of play prior to entering the NFL. Plaintiffs allege that
9 they sustained injuries from repetitive concussive events while playing football in
10 the NFL, however, each player-Plaintiff will have a unique and distinct playing
11 history, including different head-impact experiences, and possibly concussions,
12 before playing in the NFL.

13 With respect to Plaintiffs’ warning claims against the Riddell Defendants,
14 individualized player-by-player issues will include identification of the multitude
15 of warning labels, instruction manuals and other literature accompanying over 50
16 years of helmet models. Player-by-player, helmet-by-helmet determinations will
17 need to be made on whether individual player-Plaintiffs received, read and heeded
18 the different materials provided with their particular helmets. Such individualized
19 and plaintiff-specific inquiries and analyses often factor into product litigation
20 concerning helmets. *See, e.g., Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216
21 (Colo. 1982) (examining whether the plaintiff justifiably relied on alleged
22 misrepresentations by the manufacturer defendants in choosing to use one police
23 helmet over the other for personal use when he knew or should have known that
24 one of the model helmets had a quick release and the other did not); *Lister v. Bill
25 Kelley Athletic, Inc.*, 485 N.E.2d 483 (Ill. App. Ct. 1982) (discussing how the
26 specific warnings given to plaintiff by his football coaches regarding how to keep
27 his head down when tackling was material to defeating plaintiff’s duty-to-warn
28 argument). Obviously, the materials available to a player in the 1950’s differ from

1 those available to a player in the 1980's, and differed even more in comparison to
2 the materials available to a player who played in the past ten years. Then, there are
3 further individualized issues concerning the removal, addition or alteration of on-
4 helmet labels by the player-Plaintiffs themselves, third-party helmet
5 reconditioners, team equipment managers, and others.

6 Each player-Plaintiff's claim also requires an individualized determination
7 of the information known to that player about the risks of playing football,
8 including the risk of brain injury. The *Maxwell* and *Pear* Plaintiffs' Amended
9 Complaints cite thirty-six publicly-available examples of what they claim contain
10 information on concussive brain-injury risk, with alleged publication dates
11 spanning a time period from the 1890's to 1993. (*See, e.g., Maxwell* FAC ¶ 127.)
12 For Plaintiffs who played before the 1960's, ten of these examples were in the
13 public domain, according to Plaintiffs' own allegations. For Plaintiffs who played
14 after 1993, all thirty-six were publicly available. Moreover, each player's personal
15 experience with concussions, interactions with physicians and trainers,
16 acknowledgement of risks in the contracts and releases they signed, and other
17 career experiences, will impact the liability and causation analyses implicated by
18 Plaintiffs' warning claims.

19 Plaintiffs' claims require individualized player-by-player, incident-by-
20 incident consideration of the circumstances of individual concussion events to
21 determine basic facts such as whether a concussion even occurred, what led to the
22 concussion, whether the concussion involved helmet contact, and whether any
23 feasible alternative design existed at that point in time and whether it would have
24 prevented the concussion. *See, e.g., Testerman v. Riddell, Inc.*, 161 Fed. Appx.
25 286, 289 (4th Cir. 2006) (unpublished) (granting summary judgment in football
26 equipment case because plaintiff failed to prove which blow caused the alleged
27 injury, whether the area of impact was covered by the equipment, or whether any
28 alternative equipment would have made a difference). Further incident-by-incident

1 considerations would include whether helmet modifications or maintenance issues
2 played a part, or whether the concussion resulted from the player's violation of
3 rules of the game or non-compliance with warnings and instructions.

4 Plaintiffs' claims are also improperly joined with respect to the seven
5 individually named Riddell Defendants. Plaintiffs take a scattershot approach of
6 stating all claims by all Plaintiffs against all of the Riddell Defendants, even
7 though none of these defendants even existed during the years when many of the
8 player-Plaintiffs played in the NFL.¹⁴ Under Plaintiffs' improperly consolidated
9 Complaints, the player-Plaintiffs who retired earliest are making claims against
10 defendants that did not even exist while they played in the NFL, rendering it
11 impossible that those Defendants could have been involved in these Plaintiffs'
12 alleged injuries. (*See, e.g., Maxwell* FAC ¶ 293.) For this reason alone, severance
13 is essential so that each individual Plaintiff who might choose to refile an
14 individual action can do so against only appropriate defendants allegedly involved
15 in the design, manufacture, distribution or sale of the specific helmet or helmets
16 that they might contend caused their alleged injury.¹⁵

17
18 ¹⁴ All American Sports Corporation was incorporated in Delaware on September
19 13, 1991. Riddell, Inc., formerly EN&T Association, Inc., was incorporated in the
20 State of Illinois on April 4, 1988. Riddell Sports Group, Inc., is a Delaware
21 corporation incorporated on March 29, 2001. Easton-Bell Sports, Inc. was
22 incorporated in Delaware on June 13, 2003. Easton-Bell Sports, LLC was formed
23 under Delaware law on June 13, 2003. RBG Holdings Corp. was incorporated in
24 Delaware on September 17, 2004. EB Sports Corp. was incorporated in Delaware
25 on November 15, 2006. The Secretaries of States' corporate status webpages for
26 each of the above entities reflecting this information are attached as Exhibits "A"
27 through "G" to the Riddell Defendants' Request for Judicial Notice. Pursuant to
28 Rule 201 of the Federal Rules of Evidence this Court can and should take judicial
notice of these facts as they are "capable of accurate and ready determination by
resort to sources whose accuracy cannot reasonably be questioned." *See also In re*
Amgen Inc. Secs. Litig., 544 F. Supp. 2d 1009, 1023 (C.D. Cal. 2008).

¹⁵ As addressed in the Riddell Defendants' motions to dismiss, Plaintiffs'
Complaints are defective for lack of any plausible and non-conclusory allegation

1 Additionally, many of the player-Plaintiffs had vastly different NFL playing
2 experiences. Each player alleges he worked for a different team (sometimes as
3 many as four different teams) over the course of his career, during different time
4 periods, and throughout this fifty-plus-year period. (*See generally Maxwell* FAC
5 ¶¶ 176-541.) The player-Plaintiffs also played a variety of different positions with
6 different levels of exposure to possible head injury. For example, a running back
7 may be at greater risk for more forceful head impacts than a center, who may be
8 more protected from such impacts by virtue of his position, his relative size, and
9 the rules of the game. *Cf. Michael J. Stuart, et al., Injuries in Youth Football: A*
10 *Prospective Observational Cohort Analysis Among Players Aged 9 to 13 Years*, 77
11 *Mayo Clin. Proc.* 317, 318 (2002), *available at* [http://www.mayoclinic](http://www.mayoclinicproceedings.com/content/77/4/317.full.pdf)
12 [proceedings.com/content/77/4/317.full.pdf](http://www.mayoclinicproceedings.com/content/77/4/317.full.pdf) (“Injuries to offensive players occurred
13 most often to running backs.”). Moreover, as Plaintiffs themselves allege, the rules
14 of play in the NFL changed over time. (*See, e.g., Maxwell* FAC ¶ 128 (alleging
15 changes in NFL rules from 1956 to 2005).)

16 Furthermore, each player-Plaintiff’s medical history will vary significantly,
17 providing a unique factual background for each alleged injury. Practices of various
18 team physicians, trainers and other clinicians, and their specific diagnosis and
19 course of treatment for each individual player-Plaintiff after each alleged head
20 injury will also vary. The unique circumstances of each individual player’s
21 medical history and treatment will also provide differences in causation analysis,
22 further necessitating individualized – not joined – consideration and litigation.
23 *See, e.g., Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal. 4th 148, 167-68, 41 Cal. Rptr 3d
24 299, 314-15, 131 P.3d 383 (2006) (holding that the host school for a sporting event
25 breached no duty owed to an injured sports competitor because the competitor was
26
27 that Riddell Sports Group, Inc., Easton-Bell Sports, LLC, Easton-Bell Sports, Inc.,
28 EB Sports Corp., or RBG Holdings Corp. was involved in the design, manufacture,
distribution, or sale of Riddell helmets.

1 under the care and supervision of his own team's coaches and trainers who had
2 "exclusive authority" to determine whether the competitor could play or required
3 medical attention).

4 By alleging that they "suffered multiple concussions that were improperly
5 diagnosed and improperly treated throughout their careers" (*see, e.g., Maxwell*
6 FAC ¶ 178), Plaintiffs raise individualized issues concerning the care each player-
7 Plaintiff received for each alleged concussion event. Each such event will involve
8 identification of the diagnosis and treatment provided, who provided it, why
9 Plaintiffs feel they were improperly treated and diagnosed, and what, if anything,
10 this has to do with Plaintiffs' claims against the Riddell Defendants.

11 It also bears mention that Plaintiffs do not all allege the same injuries or
12 symptoms, which this Court has previously held further militates against proper
13 joinder. *Adams* at 13-14. For instance, Plaintiff George Visger complains of
14 frontal and temporal lobe damage, intermittent explosive disorder, cognitive
15 impairment, poor judgment in regard to finance and relationships, and early on-set
16 dementia. (*Maxwell* FAC ¶ 210.) Plaintiff Vernon Maxwell alleges only headaches
17 and memory loss. (*Id.* ¶ 180.) Plaintiff Mike Richardson alleges different
18 symptoms still, including depression, poor judgment, and substance abuse (*id.* ¶
19 195); while Plaintiff David Kocourek, who played some 20 years before Mssrs.
20 Vernon or Richardson and is now eighty-four (84) years old, complains of
21 dementia, but does not complain of headaches, memory loss, depression, poor
22 judgment, and substance abuse (*id.* ¶¶ 342-46). *See also Boschert v. Pfizer, Inc.*,
23 No. 4:08-CV-1714 CAS, 2009 WL 1383183 (E.D. Mo. May 14, 2009) (granting
24 severance for misjoinder based, in part, on the fact that, while the six plaintiffs all
25 claimed to have suffered the same side-effects from the allegedly defective drug,
26 "their alleged symptoms are not the same").

27 In *Adams*, this court ruled that such divergence in injuries, medical histories,
28 and products used evinced a fundamental lack of commonality and, thus, a lack of

1 proper basis for joinder. *Adams* at 13-14 (finding that the “medical histories of the
2 plaintiffs that necessitated the procedures are certainly diverse and likely share no
3 commonality”). The same holds true here.

4 Finally, with respect to questions of law, given the nature of the claims and
5 the unique circumstances of each player’s career, each claim is likely to involve
6 different legal standards based on complex choice-of-law analyses and even
7 possibly, given that laws change over time, the time period in which the alleged
8 cause of action arose or during which the Riddell Defendants’ conduct must be
9 evaluated. *See, e.g., Boschert*, 2009 WL 1383183, at *4 (finding as an additional
10 ground supporting severance the fact that the various plaintiffs’ claims would
11 necessarily “be based on each plaintiff’s respective state’s law,” which would
12 require “separate legal analyses”). Applying, for the sake of argument only,
13 California’s choice-of-law analysis, *see S.A. Empresa de Viacao Aerea Rio*
14 *Grandese v. Boeing Co.*, 641 F.2d 746, 749 (1981) (explaining that federal court
15 should normally apply the forum state’s conflict-of-law analysis),¹⁶ it is clear that
16 California substantive law should not apply across the board to all Plaintiffs’
17 claims if “either the plaintiff or the defendant has been forced into a forum devoid
18

19 ¹⁶ The Riddell Defendants do not concede that Plaintiffs’ place of residence should
20 control in terms of choice of law, or even that California choice-of-law should
21 control, given that Plaintiffs improperly joined these claims in the first place,
22 thereby improperly attempting to subject the Riddell Defendants to a California
23 choice-of-law analysis. *See, e.g., In re Toyota Motor Corp. Unintended*
24 *Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 925,
25 928-29 (C.D. Cal. 2011) (expressing concern over improper attempts to dictate
26 California substantive law over claims by plaintiffs with no connection to
27 California by filing in California and seeking to apply California’s choice-of-law
28 analysis) (discussing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985)).
The Riddell Defendants further do not concede that Plaintiffs’ claims should all
proceed in California. Rather, at this time, the Riddell Defendants maintain merely
that applying California’s choice-of-law analysis, for example only, further
demonstrates that these claims are misjoined.

1 of any such contact as would justify application of its own law.” *Kasel v.*
2 *Remington Arms Co.*, 24 Cal. App. 3d 711, 731, 101 Cal. Rptr. 314, 327-28 (1972)
3 (quoting Ehrenzweig, *Conflict of Laws* (1962), §213, p. 555).

4 Here, dozens and dozens of Plaintiffs have no cognizable connection to
5 California and, thus, no basis for application of California law to their claims. For
6 example, *Maxwell* Plaintiff Vernon Maxwell attended college in Arizona, played
7 for the Baltimore/Indianapolis Colts, Detroit Lions, and Seattle Seahawks, and now
8 resides in Arizona. (*Maxwell* FAC ¶¶ 1, 176-80.) He alleges no connection
9 whatsoever between his claims and California.¹⁷ The same applies for the second
10 *Maxwell* Plaintiff, Broderick Jones, who lives in Alabama and played for the
11 Cleveland Browns and Baltimore Colts, and who fails to allege any connection
12 between his claims and California. (*Id.* ¶¶ 2, 181-85.) The three Complaints are
13 replete with dozens and dozens of other examples of Plaintiffs with no connection
14 whatsoever between their claims and California or its law.

15 Plaintiffs’ claims are all for alleged personal injuries. While there is no
16 bright-line rule under California’s “governmental interest” approach to choice-of-
17 law analysis,¹⁸ “[w]here the real issue involved in a case is compensation of the
18 injured person, California courts have tended to apply the law of the place of the
19 injured’s domicile, finding that that state has the greatest interest in compensating
20 its domiciliaries.” *Kasel*, 24 Cal. App. 3d at 734, 101 Cal. Rptr. at 330. On this
21 basis alone, and assuming *arguendo* that California choice-of-law analysis should
22 apply and that Plaintiffs’ place of residence alone were dispositive of the choice-
23 of-law analysis (which the Riddell Defendants do not concede), Plaintiffs’ claims
24

25 ¹⁷ As demonstrated in the contemporaneously filed motion to dismiss, Plaintiffs
26 allege that several “Riddell Defendants” are California entities – Easton-Bell
27 Sports, Inc.; EB Sports Corp.; and RBG Holdings Corp. (*see, e.g., Maxwell* FAC
28 ¶¶ 79, 81-83) – but fail to allege any factual basis for any claims against them.

¹⁸ *See supra* n.14.

1 would implicate thirty-three (33) different jurisdictions' product-liability/personal-
2 injury laws. Also, as the Ninth Circuit has recognized, the laws of negligence and
3 products liability "all differ in some respects from state to state." *Zinser v. Accufix*
4 *Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001) (quoting *In re Rhone-*
5 *Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-01 (7th Cir. 1995)).

6 Further compounding the confusion is the fact that a proper conflict-of-law
7 analysis requires comparison of the forum state's laws with each non-forum
8 jurisdiction's laws as to each individual claim. *Id.* (citing *Wash. Mut. Bank v.*
9 *Superior Court*, 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071, 1081 (2001)
10 ("These [choice-of-law] rules apply whether the dispute arises out of contract or
11 tort . . . and a separate conflict of laws inquiry must be made with respect to each
12 issue in the case.")); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 n.15
13 (5th Cir. 1996) ("[B]ecause we must apply an individualized choice of law
14 analysis to each of plaintiff's claims, the proliferation of disparate factual and legal
15 issues is compounded exponentially" (quoting *Georgine v. Amchem Prods.,*
16 *Inc.*, 83 F.3d 610, 626 (3d Cir. 1996))). Thus, a proper choice-of-law analysis
17 would have to be performed as to each of the 136 player-Plaintiffs' four separate
18 claims against the Riddell Defendants, in addition to *Barnes* Plaintiff Lens's
19 wrongful-death claim, as well as the eighty-four spouses' consortium claims.

20 Should the Court not dismiss these claims outright based on the Riddell
21 Defendants' motion to dismiss, then performing a proper choice-of-law analysis
22 would be imperative, as determining the controlling law would impact many
23 potentially dispositive legal issues on which various jurisdictions' laws vary
24 significantly. For example, numerous jurisdictions apply statutes of repose to
25 products-liability claims like Plaintiffs, presenting additional grounds for possible
26 dismissal. *See, e.g.*, Tenn. Code Ann. § 29-28-103(a) (West 2011); Ohio Rev.
27 Code § 2305.10(C)(1); Tex. Civ. Prac. & Rem. Code Ann. § 16.012 (West 2011).

1 Moreover, substantive product-liability law also varies significantly from
2 jurisdiction to jurisdiction, including on issues such as standards for imposing
3 liability (e.g., strict liability versus negligence-based), the necessary elements for
4 proving product defect (e.g., certain jurisdictions, like Michigan, requiring
5 pleading and proof of an alternative feasible design), standards for proving product
6 defect (e.g., risk/utility versus consumer expectations), and the availability of
7 certain defenses (e.g., assumption of the risk, misuse/alteration/modification,
8 compliance with industry or government standards, etc.). *See Gawenda v. Werner*
9 *Co.*, 932 F. Supp. 183, 187 (E.D. Mich. 1996) (explaining that, under Michigan
10 law, “a plaintiff must prove, under a risk-utility analysis, that an available, safer,
11 alternative design should have been adopted”); *see also Zinser*, 253 F.3d at 1188
12 (recognizing that the laws of negligence and products liability “all differ in some
13 respects from state to state”).

14 Likewise, the tests for causation can vary significantly, with some
15 jurisdictions focusing on applying varying tests couched as “proximate cause,”
16 “substantial factor,” or “substantial contributing cause.” *See, e.g., Wolfe v. Stork*
17 *RMS-Protecon, Inc.*, 683 N.E.2d 264, 268 (Ind. Ct. App. 1997) (“Proximate cause
18 is an essential element of, and is determined in the same manner in, both
19 negligence and product liability actions.”); *Fritz v. White Consol. Indus., Inc.*, 306
20 A.D.2d 896, 897, 762 N.Y.S.2d 711, 714 (N.Y. App. Div. 2003) (explaining that a
21 product liability plaintiff has the burden of showing that a defect was a “substantial
22 factor” in causing injury); *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 520 (Colo.
23 1996) (“To establish causation, the plaintiff must prove that the defendant’s
24 conduct was a substantial contributing cause of the injury.”). In addition, different
25 jurisdictions have different laws governing joint-and-several liability versus
26 apportionment of fault, not to mention potential defenses such as contributory
27 negligence. *Compare* Fla. Stat. § 768.81(3) (“In a negligence action, the court
28 shall enter judgment against each party liable on the basis of such party’s

percentage of fault and not on the basis of the doctrine of joint and several liability.”), with *Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722, 728-29 (Ala. 2009) (explaining that joint and several liability applies in Alabama, and, therefore, a tort-feasor whose negligent act or acts proximately contribute in causing an injury may be held liable for the entire resulting loss.); *compare also Smith v. Fiber Controls Corp.*, 300 N.C. 669, 672 (1980) (contributory negligence will completely bar a plaintiff’s recovery in a products liability action founded on negligence), with Wash. Rev. Code § 4.22.005 (providing that any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar his recovery).

Adding another layer of individualized issues, depending on the applicable jurisdictions’ laws, Plaintiffs’ damages claims may involve vastly different limitations, set-offs, and possibly workers’ compensation bars. For example, recoverability of damages varies significantly from state to state, with some jurisdictions imposing caps on certain types of compensatory damages, punitive damages, or both. *See, e.g.*, Md. Code Ann., Cts. & Judicial Proceedings § 11-108 (2008) (establishing a cap on all non-economic damages covering “personal injury, pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury”); Va. Code Ann. § 8.01-38.1 (imposing a cap of \$350,000 on punitive damages per action). Moreover, many states’ laws differ significantly in terms of the standards for proving entitlement to punitive damages in the first place. *Compare* O.C.G.A. § 51-12-5.1 (requiring plaintiffs to prove entitlement to punitive damages “by clear and convincing evidence”), and Or. Rev. Stat. § 31.730 (same), with, *Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989) (requiring entitlement to punitive damages to be proven only by a preponderance of the evidence).

1 Plaintiffs' claims implicate a dizzying array of differing laws. The
2 necessarily disparate legal treatment implicated by this attempt to join together
3 through these three cases 136 separate player-Plaintiffs (and 84 spouses) from
4 dozens of different jurisdictions, with at least five separate claims against the
5 Riddell Defendants further compels severance of each of these actions.

6 **C. Joinder of Plaintiffs' claims would not promote the purposes of**
7 **FRCP 20, but rather would only cause delay, jury confusion,**
8 **judicial inefficiency, and prejudice.**

9 Plaintiffs cannot show proper permissive joinder under Rule 20. Moreover,
10 even if joinder were not improper – which it is – the Court should nonetheless
11 exercise its broad discretion to sever these wildly dissimilar claims pursuant to
12 FRCP 20(b). *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000).

13 In *Coleman*, ten plaintiffs originally all jointly sued Quaker alleging age
14 discrimination in connection with “reductions-in-force” that occurred between
15 1994 and 1995. *Id.* at 1277. The District Court for the District of Arizona found
16 that the plaintiffs satisfied the two prongs of FRCP 20(a) for proper permissive
17 joinder, but the court nonetheless also considered whether the claims should be
18 severed pursuant to FRCP 20(b) “and concluded that severance was appropriate.”
19 232 F.3d at 1296. Therefore, the district court “ordered the cases sent to the
20 districts in which the plaintiffs had worked for Quaker,” and allowed the three
21 plaintiffs who worked in Arizona to proceed with that case there. *Id.* at 1280.

22 The remaining three plaintiffs appealed, arguing that the district court had
23 erred in severing their claims from the other original plaintiffs. *Id.* at 1296. The
24 Ninth Circuit disagreed and affirmed. *Id.* at 1297.

25 Specifically, the Ninth Circuit noted the district court’s finding of prejudice
26 to the defendants “by having all ten plaintiffs testify in one trial.” *Id.* at 1296, 1297
27 (“The district court properly considered the potential prejudice to Quaker created
28 by the parade of terminated employees and the possibility of factual and legal

1 confusion on the part of the jury.”). The Ninth Circuit also noted the findings of
2 likely jury confusion by requiring the jury “to examine individually [each
3 plaintiff’s] employment history as well as the explanations given by Quaker for not
4 retaining him or her, explanations that would require testimony of each employee’s
5 supervisors and raters.” *Id.* at 1296. The Ninth Circuit further noted the district
6 court’s finding that “[l]egal confusion was also likely because the plaintiffs had
7 worked for Quaker in six different states, and the jury would have had to evaluate
8 their state law claims in light of the different laws of each state.” *Id.*

9 On these findings, the Ninth Circuit noted, the district court properly
10 concluded that “the likelihood of prejudice and confusion outweighed the gains
11 from judicial economy and any potential prejudice to the plaintiffs who would try
12 their cases in the states in which they lived and worked.” *Id.* Also, “[g]iven the
13 broad discretion with which the district court is vested to make a decision granting
14 severance and the fact that the district court carefully weighed the arguments in
15 favor of and against joinder,” the Ninth Circuit affirmed. *Id.* at 1297.

16 This Court should reach the same result here and, even assuming it were to
17 find proper joinder in the first place, should nonetheless sever these claims. As in
18 *Coleman*, the Riddell Defendants would be prejudiced by allowing these claims to
19 proceed together, but that prejudice would be multiplied many-fold by having to
20 deal with many more – sometimes dozens more – than ten Plaintiffs. And even
21 more so than in *Coleman*, which involved actions occurring over only a two-year
22 period, *Id.* at 1277-79, here, Plaintiffs’ claims span a period of well over 50 years.
23 Likewise, while the *Coleman* district court found likely jury confusion and
24 prejudice based on the involvement of only six different states’ laws, here, that
25 concern is again magnified many times over, given the potential applicability of
26 dozens of different jurisdictions’ laws to these wildly disparate claims.

1 There is no proper joinder here. Even if there were, this Court should
2 exercise its broad discretion to sever these disparate claims to avoid prejudice,
3 confusion, delay, and judicial inefficiency.

4 **III. CONCLUSION**

5 For the reasons set forth above, the Riddell Defendants respectfully request
6 that, pursuant to FRCP 20 and 21, the Court sever the individual player-Plaintiffs'
7 (and their respective spouses') claims in each of these three actions – *Maxwell*,
8 *Pear*, and *Barnes* – against the Riddell Defendants, dismiss all but the named
9 Plaintiffs in each three action (and player-Plaintiff Pear's spouse), and order that
10 each of those severed/dismissed claims, if re-filed, be re-filed separately, in an
11 appropriate venue, and captioned with new and separate case numbers, or for such
12 other relief as the Court deems appropriate in its broad discretion to remedy the
13 misjoinder of these disparate claims.

14
15 DATED: December 20, 2011

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16
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